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Shaen Bernhardt, Martin Fasser Heeg, Stefan Kammerlander,
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**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

CAPANA SWISS ADVISORS AG, a Swiss
corporation; AMERIMARK
AUTOMOTIVE AG, a Swiss corporation,

Plaintiffs,

v.

RYMARK, INC., a Utah corporation;
NICHOLAS THAYNE MARKOSIAN, an
individual; JOHN KIRKLAND, an individual;
and VICKY SMALL, an individual,

Defendants.

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' SHORT FORM
DISCOVERY MOTION TO STRIKE
OBJECTIONS AND COMPEL RULE
30(B)(6) DEPOSITION (ECF NO. 226)**

Case No. 2:23-cv-00467

Judge: Hon. Ted Stewart

Magistrate Judge: Hon. Cecilia M. Romero

On December 3, 2024, Defendants' counsel emailed Plaintiffs' counsel proposing dates for Plaintiffs' 30(b)(6) depositions. Plaintiffs said they needed to review Defendants' 30(b)(6) topics (which were not initially provided) before they could confirm witnesses and their availability. Defendants did not respond but instead served deposition notices on December 13, 2024, without confirming that the noticed dates would work.¹ On January 2, 2025, Plaintiffs informed Defendants that the noticed dates would not work. Defendants did not respond or serve amended notices until January 9, 2025. Plaintiffs served their objections 7 days later, on January 16, 2025.

DUCivR 30-2(b) expressly states that “[w]ithin 7 days of being served with a notice or subpoena, the noticed entity may serve a written objection.” Defendants argue that Plaintiffs’ objections to their respective 30(b)(6) deposition notices were untimely, because Plaintiffs were required to object 7 days after the original deposition notices rather than 7 days after service of the operative notices. Not so.

Defendants read the rule as requiring objections to be served 7 days after receipt of a notice *that the parties know will be amended in the future* rather than 7 days after receipt of the final and operative notice. While case law on this issue is scarce, there is case law suggesting that a party’s failure to object to an amended deposition notice with identical topics to the original effectively waives any objections. *See Escano v. RCI, LLC*, No. CV 2:22-360 DHU/GJF, 2024 WL 1532749, at *5 (D.N.M. Mar. 1, 2024) (holding that it was reasonable for the noticing party to expect the party being deposed would produce a witness to testify on all topics in the second deposition notice, even though the party had objected to the first deposition notice with identical topics). It logically follows that parties only need to object to the *operative* notice to avoid having to serve multiple objections, as Plaintiffs did here.

This situation highlights why this Court requires parties to confer on deposition dates before serving notices and why FRCP 30 suggests parties should confer on 30(b)(6) topics *before*

¹ December 13, 2024 was the last date to serve 30(b)(6) notices prior to the fact discovery cutoff of January 28 pursuant to DUCivR 30-2(a)(1).

service of a notice. FRCP 30(b)(6) (“Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination.”) Had Defendants responded to Plaintiffs’ request for topics or conferred about dates rather than waiting until the last minute to serve its notices, Plaintiffs would have understood the notices served in December as the notices that would actually govern their depositions.

Further, Defendants’ concerns about the timing of Plaintiffs’ objections one week before the depositions are set to proceed is an issue of their own making. Defendants served the original notices on the last day to do so and without conferring about dates. Plaintiffs provided dates of availability on January 2, and Defendants waited another week to serve the notices.

Dated: January 22, 2025

PARSONS BEHLE & LATIMER

/s/ Erik A. Christiansen

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Hannah Ector

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Third-Party Defendants Shaen Bernhardt,
Martin Fasser Heeg, Stefan Kammerlander,
and AmeriMark Group AG*

CERTIFICATE OF SERVICE

I hereby certify that on **January 22, 2025**, I caused a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' SHORT FORM DISCOVERY MOTION TO STRIKE OBJECTIONS AND COMPEL RULE 30(B)(6) DEPOSITION** to be filed on CM/ECF and accordingly electronically served to the parties of record.

/s/ Hannah Ector

Hannah Ector